

ORIGINAL
FILE

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

ORIGINAL

In re Applications of

MM Docket No. 92-253

BAKCOR BROADCASTING, INC., DEBTOR
c/o DENNIS ELAM, TRUSTEE

File No. BRH-900330VV

For Renewal of License of
Station KLIK(FM)
Lubbock, Texas

SOUTHWEST EDUCATIONAL MEDIA
FOUNDATION OF TEXAS, INC.

File No. BPED-900629MK

For Construction Permit for a New
FM Station on Channel 229C1
Lubbock, Texas

To: Honorable Walter C. Miller
Administrative Law Judge

OPPOSITION TO MOTION TO ENLARGE ISSUES

BAKCOR BROADCASTING, INC., DEBTOR
C/O DENNIS ELAM, TRUSTEE

Lawrence Roberts
Linda J. Eckard

Roberts & Eckard, P.C.
1919 Pennsylvania Avenue
Suite 222
Washington, D.C. 20006
(202) 296-0533

Its Counsel

December 10, 1992

File of Clerk rec'd

ENCLOSURE

at 6

OPPOSITION TO MOTION TO ENLARGE ISSUES

Bakcor Broadcasting, Inc., Debtor, c/o Dennis Elam, Trustee ("Bakcor") hereby opposes the Motion to Enlarge Issues filed by Southwest Educational Media Foundation of Texas, Inc. ("SEMFOT") on November 27, 1992.^{1/} The motion should be summarily denied because the issues raised involve the type of private disputes over which the Commission has repeatedly refused to exercise jurisdiction. Thus, the allegations raised by SEMFOT are not properly the subject of initial Commission inquiry, are properly within the jurisdiction of other fora and have in fact already been resolved.

**THE FACTS SURROUNDING THE TERMINATION OF THE SETTLEMENT
AGREEMENT DO NOT REFLECT A LACK OF CANDOR BY THE TRUSTEE BEFORE
THE COMMISSION**

1. SEMFOT alleges that Mr. Elam, the Trustee for Bakcor, has not been candid with the Commission and thus lacks the requisite qualifications to be a licensee.^{2/} The erroneous allegations involve a settlement agreement between Bakcor and SEMFOT that was properly terminated by Bakcor pursuant to an

^{1/} This opposition is timely filed pursuant to Section 1.294(c), which requires that oppositions to motions to enlarge the issues be filed within 10 days of the filing of the motion, and Section 1.4 which permits an additional three days in which to file an opposition if the motion is served by mail.

^{2/} In contrast to SEMFOT's unsupported allegations about the Trustee, SEMFOT's own lack of candor before the Commission has been documented thoroughly in the Motion to Enlarge the Issues filed by Bakcor against SEMFOT on November 30, 1992.

Order of Judge King of the United States Bankruptcy Court. Judge King properly exercised jurisdiction over the terms and enforceability of that agreement. While SEMFOT may not agree with Judge King's Order, it may not relitigate that decision in this proceeding. SEMFOT has already exercised the sole legal remedy available to it and appealed Judge King's decision to the United States District Court. That appeal remains pending.

2. The Commission has held that interpreting and enforcing the terms of a settlement agreement involving a Commission authorization is a matter to be decided in a civil forum even when the decision has a direct impact on the rights of applicants before the Commission. Hanover Radio, Inc., 52 RR 2d 403 (Rev. Bd. 1982), aff'd sub nom. Ninety-Two Point Seven Broadcasting, Inc., 55 RR 2d 607 (1984). In Hanover the Commission ruled that the "question of whether a valid and binding contract exists [with respect to a settlement agreement in an FM comparative hearing] is one of state contract law." Id. at 610. See also Llerandi v. FCC, 863 F.2d 79 (D.C. Cir. 1988) (noting Commission action granting an assignment of license application -- filed in response to a judicial directive that the licenses be assigned -- where the Commission followed its practice of deferring to state court resolution of contract disputes) and D.H. Overmyer Telecasting Co., Inc., 53 RR 2d 1701, 1705 (1983) (Commission defers to bankruptcy court order

directing transfer of station operation to creditor bank subject to court supervision).

3. SEMFOT's failure to take such precedents into account is consistent with its failure to recite accurately the terms of the settlement agreement and the procedural history surrounding its termination. The settlement agreement was initially approved by Order of Judge King dated October 9, 1991. (See Copy of Order attached hereto as Exhibit A.) The settlement agreement was filed with the Commission on October 3, 1991. However, apparently as a result of an ongoing Commission investigation concerning Kent Atkins and various entities with which he is associated, the Commission had still not acted on the settlement by March. As a result, the Trustee notified SEMFOT by letter dated March 3, 1992, that he would seek to terminate the agreement unless action by the Commission on the settlement agreement occurred by March 31. (See Motion to Enlarge, Exhibit 3.) SEMFOT thereupon filed a motion with the Bankruptcy Court seeking to enjoin the Trustee from terminating the agreement. Judge King denied that motion. (See Order dated March 25, 1992, attached hereto as Exhibit B.) By Motion filed April 3, the Trustee sought approval to terminate the settlement agreement. By Order dated April 22, 1992, Judge King ordered termination of the agreement. (See Order attached hereto as Exhibit C.)

4. SEMFOT's own actions before the Bankruptcy Court belie its claim, which it only now finds convenient to assert, that the Commission should be involved in deciding the enforceability of the settlement agreement. SEMFOT joined in a motion filed with Judge King seeking approval of the terms of the settlement agreement. After the Trustee sought to terminate the agreement, SEMFOT acknowledged that the controversy involves "state law claims to which either or each of the parties is entitled to a jury trial." (See SEMFOT's Motion to Stay Proceeding, at p. 2, attached hereto as Exhibit D.) SEMFOT cannot now argue that the Commission is the appropriate forum for resolving the issue. The simple fact is that the issue of whether the Trustee had the right to terminate the settlement agreement has been decided by the appropriate judicial body and the Commission should defer to that decision.

5. Also contrary to SEMFOT's attempt to rehash this issue before the Presiding Judge is SEMFOT's failure to respond to a letter filed on behalf of Bakcor notifying the Commission's staff that the settlement agreement had been terminated. (See letter from Linda J. Eckard to Donna R. Searcy dated June 30, 1992, attached hereto as Exhibit E.) A copy of that letter was sent to James L. Oyster, communications counsel to SEMFOT. SEMFOT's failure to object to Bakcor's request to dismiss the settlement agreement is further evidence that SEMFOT has until

now acknowledged that the Commission is not the appropriate forum to address this dispute.

6. On the substantive merits, SEMFOT's feeble attempt to paint the Trustee as a person who has failed to be candid with the Commission is riddled with false assumptions and factual inaccuracies. By March 1992 the Trustee concluded that action on the settlement agreement was not likely to occur for quite some time because of questions concerning SEMFOT's qualifications. By letter dated March 3, 1992, a copy of which is appended as Exhibit 3 to SEMFOT's motion to enlarge, the Trustee advised SEMFOT of his intent to terminate the settlement agreement unless SEMFOT obtained approval from the Commission by March 31, 1992, or, consistent with the agreement, assigned its rights to acquire the license of Station KLIK to a party who had the requisite qualifications to be a licensee. Bakcor is unaware of any efforts by SEMFOT to pursue either option.^{3/} While SEMFOT alleges by inference rather than with supporting facts that the Trustee never intended to honor the terms of the settlement agreement (see Motion to Enlarge at para. 14), it is SEMFOT who made no apparent attempt to meet its terms.

^{3/} Bakcor finds it rather curious that pursuant to the Trustee's March 3 letter SEMFOT was provided an opportunity to assign its rights under the agreement to a qualified party but chose not to do so and then, on the eve of the hearing, attempted to substitute a new entity for SEMFOT and Mr. Workman for Mr. Atkins.

7. The settlement agreement between Bakcor and SEMFOT entered into on September 16, 1991, a copy of which is appended as Exhibit 1 to SEMFOT's motion to enlarge, contains critical language that SEMFOT appears unwilling to acknowledge. Paragraph 4 contemplated action on the settlement agreement within a "reasonable period of time". This term was not defined and is the type of contractual provision which is open to interpretation based upon the specific circumstances surrounding the agreement.

8. In acting on the Trustee's request to terminate the agreement, Judge King found that "SEMF's obtaining of FCC approval of the Settlement Agreement and the transfer of KKIK(FM)'s broadcasting license contemplated by it within a reasonable time was a critical condition to closing the sale. SEMF has not and cannot comply with this condition. The Court, therefore, finds compelling equities to permit termination and setting aside of the Settlement Agreement and sale contemplated by it." (See Findings of Fact and Conclusions of Law, at p. 5, attached hereto as Exhibit F.) Judge King went on to conclude as a matter of law that "[t]he failure to obtain FCC approval of the Settlement Agreement within a reasonable time was not the result of any act or failure to act of the Trustee. The Trustee has been at all times ready and willing to close the sale if the conditions to closing had been met." (See Exhibit F, at p. 6.) Thus, the issue of the Trustee's actions in terminating the

settlement agreement have been argued in open court before a Judge with jurisdiction over the terms of the agreement and his decision should be considered binding on the parties.

9. While Bakcor believes that the case law supports its position that it is inappropriate and unnecessary to relitigate in this proceeding the issue raised in the motion to enlarge, Bakcor wishes to comment on several other assertions in SEMFOT's motion. First, SEMFOT has provided no evidence that the Trustee lacked good faith when entering into the settlement agreement merely because the Trustee later sought to terminate it after the dismissal of SEMFOT's application for Bakcor's Midland, Texas, FM station.

10. Second, SEMFOT claims that the Trustee made misleading statements to Judge King in the bankruptcy proceeding. (See Motion to Enlarge, at p. 7.) Again, SEMFOT has already unsuccessfully argued this claim before Judge King, who found that "the claimed erroneous pleadings did not influence or affect the Court's Order of April 23, 1992." (See Exhibit F, at p. 5, ¶14.)^{4/}

^{4/} One of the alleged misleading statements is that the Trustee had filed an assignment application with the FCC to assign the license of Station KKIK(FM) from Bakcor to SEMFOT when in fact no assignment application was on file. (See Motion to Enlarge, at p. 7.) What SEMFOT overlooks is that the erroneous statement appears to have first been made by SEMFOT itself in a motion filed with Judge King.
(continued...)

11. Finally, SEMFOT questions the Trustee's motive in rejecting the bid of Don Workman to purchase Station KIKI. (See Motion to Enlarge, at p. 5.) What SEMFOT inexplicably fails to disclose is that SEMFOT itself filed an objection to the Trustee's motion to sell the station to Mr. Workman. (See Objection, attached hereto as Exhibit H.)^{4/} The filing of SEMFOT's objection along with the objections filed by other parties caused the bidding process to be reopened.

12. SEMFOT has failed to show that the Trustee for Bakcor has in any way been untruthful or less than candid with the Commission. The motion should be seen for what it is -- an unwarranted attempt to discredit Bakcor.

**SEMFOT'S CLAIM THAT THE TRUSTEE HAS ENGAGED IN DISCRIMINATION
AND HARASSMENT IS NOT SUPPORTED**

13. SEMFOT has leveled serious accusations against the Trustee with no substantive evidence. Such allegations should not be made lightly and yet the only support which SEMFOT offers is a conclusory letter from a former employee of Bakcor

^{4/}(...continued)

SEMFOT states that "the Agreement provided for the Trustee to assign the license renewal application for KIKI-FM on file with the FCC to the movant. The Trustee has made application for such assignment." (See Motion Seeking to Enjoin Action of the Trustee, attached hereto as Exhibit G, at p. 2, ¶8.)

^{5/} Three other parties, Ramar Communications, Bank One, and Sonance Communications, Inc., filed objections.

which claims that the Trustee engaged in sexual harassment and racial discrimination. The letter contains no references to any actions on the part of the Trustee that would constitute sexual harassment and recites one statement that the Trustee allegedly made which the employee interpreted to be a discriminatory remark.

14. That employee's claim was referred to Audra Bradshaw of the U.S. Trustee's office, Department of Justice, who is charged with the responsibility of investigating such complaints lodged against a Trustee. (See Motion to Enlarge, Exhibit 9.) Attached hereto as Exhibit I is a copy of a declaration from Dennis Elam, the Trustee, in which he denies the claims.^{6/} Furthermore, he states that he has learned from Ms. Bradshaw that the investigation is completed, no basis for such claims has been found and no further action will be taken.

15. The Commission has repeatedly stated that it will not review claims of discrimination and harassment in the first instance. Shareholders of GAF Corporation, 7 FCC Rcd 3225, 3228 (1992). The Commission has neither the resources nor the expertise to investigate such claims and thus will defer to the findings of an agency charged with that responsibility. Should the agency find that a licensee has engaged in discrimination or

^{6/} The original of Mr. Elam's declaration will be filed as a supplement to this opposition.

harassment the Commission will then consider that finding in reviewing the qualifications of the licensee.

16. A finding on the claims has been made by an attorney from the Department of Justice charged with responsibility for supervising the Trustee. The claims have been found to be without merit and thus, consistent with the Commission's past practice, deference should be given to that decision. Because no substantial and material question of fact has been raised and since it has been found that there is nothing further to investigate, SEMFOT's request for enlargement of the issues based on unsubstantiated claims of discrimination and harassment must be denied.

WHEREFORE, for the foregoing reasons, Bakcor respectfully requests that SEMFOT's Motion to Enlarge Issues be DENIED.

Respectfully submitted,

BAKCOR BROADCASTING, INC., DEBTOR
C/O DENNIS ELAM, TRUSTEE

By:

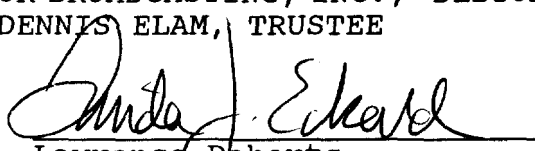

Lawrence Roberts
Linda J. Eckard

EXHIBIT A

2100

FILED

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND/ODESSA DIVISION

OCT 09 1991

U. S. DISTRICT COURT
CLERK'S OFFICE

By [Signature] Deputy

IN RE:

BAKCOR BROADCASTING, INC.
and BAKKE COMMUNICATIONS,
INC.,

Debtors.

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CONSOLIDATED CASE
NO. 89-70218-RBK
CHAPTER 7

ORDER APPROVING
SETTLEMENT AGREEMENT

ON THIS DAY came on to be heard the Joint Motion for Approval of Settlement Agreement Filed by the Trustee and Southwest Educational Media Foundation of Texas, Inc., and the Court, having considered the same, after due notice to all interested parties, being of the opinion that the same should be approved,

IT IS ORDERED that the Settlement Agreement between Dennis Lee Elam, Chapter 7 Trustee, and Southwest Educational Media Foundation of Texas, Inc., providing for sale of radio station KLIK-FM, Lubbock, Texas, by the Trustee to Southwest Educational Media Foundation of Texas, Inc., and settlement of all other matters between them, be and they same is hereby approved.

IT IS FURTHER ORDERED that said sale shall be free and clear of any liens or other interests in such property of an entity other than the estate, and that such liens and interests shall attach to the proceeds thereof, subject to the rights of the Trustee or any other administrative claimant to assert recovery of their claims from such proceeds.

Re: 257

363

DATED: Oct. 9, 1991.

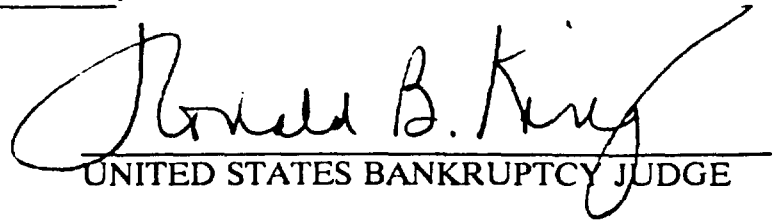

UNITED STATES BANKRUPTCY JUDGE

EXHIBIT B

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND/ODESSA DIVISION

IN RE:

BAKKE COMMUNICATIONS, INC.
and BAKCOR BROADCASTING, INC.,

Debtors.

DENNIS ELAM, CHAPTER 7
TRUSTEE FOR BAKKE
COMMUNICATIONS, INC. and
BAKCOR BROADCASTING, INC.,

Plaintiff,

vs.

CHARLES KEITH ADAMS d/b/a
ABILENE COMMUNITY RADIO and
WESTWIND TWO and SOUTHWEST
EDUCATIONAL MEDIA FOUNDATION
OF TEXAS, INC.,

Defendant.

CASE NO. 89-70218-RBK

ADVERSARY NO. 91-7017

FILED

MAR 31 1992

U. S. DISTRICT COURT
CLERK'S OFFICE

By C. O. Deputy

ORDER DENYING PRELIMINARY INJUNCTION
REQUESTED BY SEMF AGAINST DENNIS ELAM, TRUSTEE

ON THIS DAY came on to be considered the Motion of Southwest Educational Media Foundation of Texas, Inc. ("SEMF") for a preliminary injunction against Dennis Elam, Chapter 7 Trustee ("Trustee"), and after due consideration, the Court being of the opinion that said Motion should be ~~dismissed~~, *denied*;

IT IS ORDERED that the Motion Seeking to Enjoin Actions of the Trustee filed by SEMF against the Trustee be, and the same is hereby, ~~dismissed~~ *denied*.

DATED: MARCH 25, 1992.

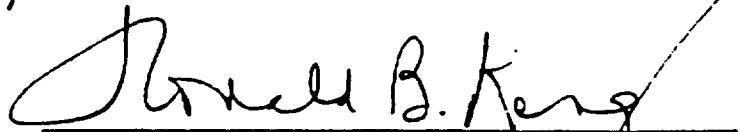

UNITED STATES BANKRUPTCY JUDGE

EXHIBIT C

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND/ODESSA DIVISION

E I L E D

APR 23 1992

U. S. DISTRICT COURT
CLERK'S OFFICE

By Deputy

IN RE:

BAKCOR BROADCASTING, INC.
and BAKKE COMMUNICATIONS,
INC.,

Debtors.

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CASE NO. 89-70218-RBK
CONSOLIDATED CHAPTER 7

**ORDER APPROVING TRUSTEE'S TERMINATION OF
LETTER AGREEMENT WITH SOUTHWEST
EDUCATIONAL MEDIA FOUNDATION OF TEXAS, INC.
DATED SEPTEMBER 13, 1991**

ON THIS DAY came on to be heard the Motion of Trustee for Approval of Termination of Letter Agreement with Southwest Educational Media Foundation of Texas, Inc., and it appearing to the Court that Southwest Educational Media Foundation of Texas ("SEMF") has not and cannot comply with its obligations under that certain Letter Agreement dated September 13, 1991, between the Trustee and SEMF, within a reasonable time, and that the Court should therefor grant such motion;

IT IS ORDERED that the termination by Dennis Elam, Trustee, of that certain Letter Agreement dated September 13, 1991, between him and SEMF, on the basis that the same has not and cannot be completed by SEMF within a reasonable time be, and the same is hereby, approved by this Court.

DATED: APRIL 22, 1992.


UNITED STATES BANKRUPTCY JUDGE

EXHIBIT D

FILED

UNITED STATES BANKRUPTCY COURT
Western District of Texas
Midland-Odessa Division

APR 16 1992

U. S. DISTRICT COURT
CLERK'S OFFICE

By Deputy

IN RE:

BAKCOR BROADCASTING, INC.
and BAKKE COMMUNICATIONS, INC.

Debtors

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CASE NO. 89-70218-RBK

CONSOLIDATED CHAPTER 7

MOTION TO STAY PROCEEDING PENDING
MOTION TO WITHDRAW THE REFERENCE AS TO THE
TRUSTEE'S MOTION TO TERMINATE LETTER AGREEMENT WITH
SOUTHWEST EDUCATIONAL MEDIA FOUNDATION OF TEXAS, INC.

TO THE HONORABLE JUDGE OF SAID COURT:

Comes Now SOUTHWEST EDUCATIONAL MEDIA FOUNDATION OF TEXAS, INC. ("Southwest Educational") and files this Motion to Stay Proceeding Pending Motion to Withdraw the Reference as to the Trustee's Motion to Terminate Letter Agreement and in support thereof would respectfully show the Court as follows:

1. This case was originally filed as a voluntary Chapter 11 proceeding on May 15, 1989.

2. This case was converted from a proceeding under Chapter 11 to a proceeding under Chapter 7 on May 22, 1991, and Dennis Elam was appointed Trustee and has continued to operate the businesses of the Debtor.

3. On September 13, 1991, the Trustee entered into a Letter Agreement (the "Contract") with Southwest Educational providing for sale to Southwest Educational of radio station KLIK-FM, Lubbock, Texas, which provided, inter alia, for the obtaining by Southwest Educational of approval from the Federal Communications Commission ("FCC") for the use of the frequency currently occupied by KLIK-FM, the withdrawal by Southwest

Educational of its application before the FCC for a construction permit affecting KNFM-FM, Midland, Texas, and the rebroadcast of programming of KAMY-FM (owned by Southwest Educational) over KKI-K-FM until closing. Closing was to occur upon the approval of the FCC to the KKI-K-FM application becoming final. Such Contract was approved by this Court by order entered October 9, 1991.

4. As part of the Contract, Southwest Educational withdrew its application for a construction permit on KNFM-FM in Midland and the withdrawal became final in the middle to the latter part of February, 1992.

5. On March 3, 1992, the Trustee gave Southwest Educational notice by mail that Southwest Educational would have until March 31, 1992, to secure the approval of the FCC of the joint application or the Trustee would cease rebroadcasting the programming of KAMY-FM over KKI-K-FM.

6. On March 19, 1992, Southwest Educational filed its Motion to Enjoin the Actions of the Trustee and by order entered March 31, 1992, the Court denied the preliminary injunction requested. The Trustee terminated the rebroadcasting on April 1 or April 2, 1992.

7. The Trustee has filed his Motion to Terminate Letter Agreement with Southwest Educational which is in reality a motion to rescind or terminate a contract. This is a non-core proceeding involving state law claims to which either or each of the parties is entitled to a jury trial.

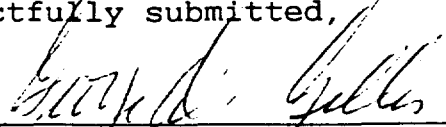
8. The action of the Court should be stayed on the Trustee's Motion to Stay Proceeding pending a review and

determination by the Court of Southwest Educational's Motion to Withdraw the Reference as to the Trustee's Motion.

9. The Stay requested is not sought to cause harm or delay, but to insure that justice is done.

WHEREFORE, premises considered, Southwest Educational prays the Court stay any hearing and determination of the Trustee's Motion pending a hearing and determination of Southwest Educational's Motion to Withdraw the Reference and that the Court grant such other and further relief, at law or in equity, to which Southwest Educational may show itself justly entitled.

Respectfully submitted,



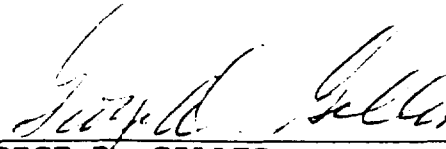
GEORGE D. GILLES
Attorney at Law
310 W. Texas, Suite 701
Midland, Texas 79701
(915) 682-3931
State Bar No. 07925300
Fax No. (915) 682-3993

CERTIFICATE OF SERVICE

This is to certify that on the 16th day of April, 1992, a true and correct copy of the above and foregoing Motion to Stay Proceeding Pending Motion to Withdraw the Reference as to the Trustee's Motion to Terminate Letter Agreement with Southwest Educational Media Foundation of Texas, Inc., was sent by U. S. mail, first class, postage prepaid to the entities set forth in the matrix attached hereto and hand delivered as follows:

Mr. Neal Allen
Stubbeman McRae Sealy Laughlin & Browder, Inc.
800 First City Tower II
Midland, Texas 79701

Dennis Elam, Trustee
4526 E. University
Odessa, TX 79762



GEORGE D. GILLES

UNITED STATES BANKRUPTCY COURT
Western District of Texas
Midland-Odessa Division

IN RE:

BAKCOR BROADCASTING, INC.
and BAKKE COMMUNICATIONS, INC.

Debtors

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CASE NO. 89-70218-RBK

CONSOLIDATED CHAPTER 7

ORDER

Came on for consideration the Motion of Southwest Educational to Stay Proceeding pending Motion to Withdraw the Reference as to the Motion of the Trustee to Terminate the Letter Agreement. After considering the pleadings, evidence and arguments of counsel, the Court is of the opinion the Motion to Stay Proceeding is well taken and should be granted. Accordingly it is

ORDERED that the Motion to Stay Proceeding is granted pending a determination by the Court of the Motion to Withdraw the Reference as to the Motion of the Trustee to Terminate the Letter Agreement with SOUTHWEST EDUCATIONAL MEDIA FOUNDATION OF TEXAS, INC.

DATED: _____, 1992.

JUDGE PRESIDING

EXHIBIT E